Dato' Dr Low Bin Tick v Datuk Chong Tho Chin and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–73–10 OF 2015(W), 02–74–10 OF 2015(W), 02–75–10 OF 2015(W) AND 02–76–10 OF 2015(W)

AHMAD MAAROP CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, RAMLY ALI AND AZIAH ALI FCJJ

7 AUGUST 2017

Tort — Defamation — Absolute privilege — Whether defamatory allegations made in complaints/reports lodged with Anti-Corruption Agency ('ACA'), Commercial Crime Division of the police ('CCD') and Registrar of Societies ('ROS') were protected by absolute privilege — Whether decision of Federal Court in Lee Yoke Yam v Chin Keat Seng [2013] 1 MLJ 145 that police reports in Malaysia were protected by absolute privilege on grounds of public policy ought to be extended to reports lodged with the ACA, CCD and ROS as the common purpose in all the cases was to cause complaints to be investigated and, if necessary, action taken against wrongdoers — Whether even though such reports were made without mandate or authority absolute privilege would still apply as primary consideration due to administration of justice and overriding public policy that those who have legitimate complaints should feel free to make them without fear of being sued for defamation

The respondent in these appeals was a past president of the Chinwoo Athletic Association, Selangor and Kuala Lumpur ('Chinwoo') and, at all material times, was also a lawyer who had a private practice. Seven years before the respondent became president, Chinwoo resolved at an extraordinary general meeting ('EGM') to enter into a joint venture with a developer to develop a piece of land owned by Chinwoo. By two agreements ('the 1985 and 1986 agreements'), Chinwoo agreed to sell the land to the developer and, in turn, the developer agreed to sell 23% of the total number of units that would be built, to Chinwoo. However, no development took place. After the respondent became the president of the association, another EGM of Chinwoo decided to revoke the 1985 and 1986 agreements and enter into fresh sale and purchase agreements ('the 1992 SPAs') with the developer. The 1992 SPAs incorporated the EGM's decision to maintain the 23% share of units that Chin Woo would get under the development. Accordingly, the 1992 SPAs provided that Chin Woo would buy 154 units and 159 car park bays from a pre-determined total number of 669 units that the developer would build. Contemporaneous with the 1992 SPAs, the parties signed a supplemental agreement which contained a clause ('the free hand clause') that allowed the developer to develop the land 'in whatever manner it may deem fit'. The 1992 SPAs and the supplemental

agreement were prepared by the respondent's law firm. Besides being the president, the respondent was also one of Chinwoo's trustees and a member of its property committee at the time. After the development on the land was completed and Chinwoo had received the units it had contracted for, some members realised that under the free hand clause, the developer, after obtaining the approval of the authorities, had in fact built 870 units and not 669 and therefore Chinwoo had received less than the 23% of the total number of units built. Two years after the appellant succeeded the respondent as president of Chinwoo, the annual general meeting ('AGM') of the association passed a unanimous resolution ('the 2003 resolution') directing Chinwoo's general committee ('GC') to investigate whether there were any irregularities in the carrying out of the development project; whether what Chinwoo obtained in its deal with the developer was fair, and that if there were any irregularities, Chinwoo was to obtain legal advice and take such action as was appropriate. The GC established an independent general committee ('ICE') comprised of non-Chinwoo members. ICE carried out an investigation and reported, inter alia, that the GC that was led by the respondent at the material time was negligent in failing to protect Chinwoo's entitlement to 23% of the total number of constructed units. The GC that was headed by the appellant studied the ICE report and decided, inter alia, to send copies of the report to the Bar Council of Malaysia ('BC'), the then Anti-Corruption Agency ('ACA') and the Registrar of Societies ('ROS'). The appellant informed the GC that in accordance with the 2003 resolution, he would forward the ICE report to ROS, BC, ACA and also to the police's commercial crime division ('CCD'). The GC members did not object to his proposed course of action. By separate letters ('the impugned letters'), the appellant sent the ICE report to the disciplinary board ('DB') of the Malaysian Bar as well as to the BC, ACA, ROS and the CCD for their further action. He then reported his actions to Chinwoo's AGM. In totality, the appellant in the impugned letters alleged that the respondent had probably committed criminal breach of trust and fraud, breached professional ethics as a lawyer, misused his power as president of Chinwoo and had been negligent. The respondent filed defamation suits against the appellant which led to the instant appeals. In each case, the High Court upheld the respondent's claim, rejected the appellant's defences of absolute and/or qualified privilege and/or justification and awarded the respondent general, aggravated and exemplary damages. The court held that none of the defences availed the appellant as his actions did not have the mandate of Chinwoo's AGM or its GC; that he failed to prove the truth of the allegations he had made in the impugned letters, which were largely based on suspicion; and that his actions were malicious or mala fide. The Court of Appeal ('the COA') agreed with the High Court's findings and dismissed the appellant's appeals. One of the questions on which the Federal Court granted the appellant leave to appeal was whether the Federal Court's decision in *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ('Lee Yoke Yam') — which held that on public policy considerations, a police report in Malaysia was protected

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by absolute privilege — should apply to afford similar protection to the defamatory allegations that were raised in the impugned letters to ROS, ACA and the CCD because, just like police reports, the purpose of lodging reports/complaints with ROS, ACA and the CCD was to enable those bodies to investigate alleged wrongdoings and take appropriate action against wrongdoers. The respondent, however, argued that not only should *Lee Yoke Yam* not apply to the instant case but that the decision in *Lee Yoke Yam* should be reviewed to say that police reports should only be accorded qualified privilege.

Held, allowing the appeals herein and setting aside the decisions of the courts below:

(1) This court found no ground to depart from its decision in *Lee Yoke Yam* that, in Malaysia, on public policy considerations, a police report was protected by absolute privilege. The ratio in *Lee Yoke Yam* ought to be applied to complaints lodged with the ACA, the CCD and the ROS consistent with the principle that the occasions for the lodging of such complaints were also occasions of absolute privilege. The ACA, the CCD and the ROS shared a common feature in that they were statutorily empowered to investigate alleged wrongdoings and take appropriate action against alleged wrongdoers. ACA reports were akin to police reports; a complaint lodged with the CCD was in essence a police report since the CCD was part of the police; and under the Societies Act 1966, the ROS was allowed to prosecute certain offences under the Act. There was no meaningful difference between a complaint/report lodged with the police and one that was lodged with the ACA, the CCD or the ROS as they were all governed by similar considerations. The common vein in the impugned letters was a request to the authorities concerned to investigate and to take action, if appropriate (see paras 34, 37–39 & 41).

(2) The courts below misdirected themselves in holding that the defences of absolute privilege and qualified privilege were not available to the appellant because he had sent the impugned letters without authority or mandate. The defence of absolute privilege applied where the primary interest was the due administration of justice and the overriding public policy that those who had complaints should be free to make them. Authority or mandate was not a necessary consideration for the defence of absolute privilege to apply (see paras 42–44).

(3) The letter sent by the appellant to the BC was prima facie an occasion of qualified privilege. The appellant clearly had an interest to forward to the BC for its attention the complaint that he had sent to the DB. The BC had a corresponding interest or duty to receive the communication as the respondent was an advocate and solicitor. Qualified privilege depended on the occasion on which the communication was made and not the

communication itself. A qualified privileged occasion was an occasion where the person who made a communication had an interest or a legal, social or moral duty to make it to the person to whom it was made, and the person to whom it was made had a corresponding interest or duty to receive it (see paras 46 & 53).

(4) The courts below found that the absence of mandate to lodge the complaints was per se sufficient to prove malice. However, this court found that the minutes of the 2003 AGM and the GC meeting on 2 November 2004 showed that there was sufficient mandate for the appellant to lodge the complaints. The appellant's mere act of filing the complaints with the various relevant authorities, without more, was insufficient to prove malice. The respondent had failed to prove that the appellant was actuated by malice (see paras 57–58).

[Bahasa Malaysia summary

Responden dalam rayuan-rayuan ini adalah presiden mantan Persatuan Olahraga Chinwoo, Selangor dan Kuala Lumpur ('Chinwoo') dan, pada masa material, juga adalah peguam yang mempunyai firma guaman persendirian. Tujuh tahun sebelum responden menjadi presiden, Chinwoo memutuskan di mesyuarat agung luar biasa ('EGM') untuk memasuki usaha sama dengan pemaju untuk memajukan sebidang tanah yang dimiliki oleh Chinwoo. Melalui dua perjanjian ('perjanjian 1985 dan 1986'), Chinwoo bersetuju untuk menjual tanah kepada pemaju dan, sebaliknya pemaju bersetuju untuk menjual 23% daripada jumlah keseluruhan unit yang akan dibinakan, kepada Chinwoo. Walau bagaimanapun, tiada pembangunan yang berlaku. Selepas responden menjadi presiden persatuan, satu lagi EGM Chinwoo memutuskan untuk membatalkan perjanjian-perjanjian 1985 dan 1986 dan memasuki perjanjian jual beli baharu ('PJB 1992') dengan pemaju. PJB 1992 tersebut menggabungkan keputusan EGM tersebut untuk mengekalkan 23% syer terhadap unit-unit yang Chinwoo akan perolehi di bawah pembangunan tersebut. Oleh itu, PJB 1992 tersebut memperuntukkan bahawa Chinwoo akan membeli 154 unit dan 159 tempat letak kereta daripada jumlah yang ditetapkan sebanyak 669 unit yang akan dibina oleh pemaju. Selaras dengan PJB 1992, pihak-pihak menandatangani perjanjian tambahan yang mengandungi klausa ('klausa kebebasan penuh') yang membenarkan pemaju untuk memajukan tanah tersebut 'in whatever manner it may deem fit'. PJB 1992 dan perjanjian tambahan disediakan oleh firma guaman responden. Selain daripada menjadi presiden, responden juga adalah salah seorang pemegang amanah Chinwoo dan ahli jawatankuasa hartanahnya pada masa itu. Selepas pembangunan ke atas tanah tersebut diasiapkan dan Chinwoo telah menerima unit-unit yang ia kontrakkan, beberapa ahli merealisasikannya di bawah klausa kebebasan penuh, pemaju, selepas memperolehi kelulusan daripada pihak-pihak berkuasa, telah sebenarnya membina 870 unit dan bukan 669 dan oleh itu Chinwoo telah menerima kurang daripada 23%

daripada jumlah keseluruhan unit-unit yang dibina. Dua tahun selepas perayu menggantikan responden sebagai presiden Chinwoo, mesyuarat agung tahunan ('AGM') persatuan meluluskan resolusi sebulat suara ('resolusi 2003') mengarahkan jawatankuasa am Chinwoo ('GC') untuk menyiasat sama ada terdapat apa-apa ketaksamaan dalam menjalankan projek pembangunan tersebut; sama ada apa yang diperolehi oleh Chinwoo dalam urusannya dengan pemaju adalah adil, dan bahawa jika terdapat apa-apa ketaksamaan, Chinwoo akan mendapatkan nasihat undang-undang dan mengambil tindakan tersebut seperti yang wajar. GC menubuhkan jawatankuasa am bebas ('ICE') yang mengandungi bukan ahli Chinwoo. ICE menjalankan siasatan dan melaporkan, antara lain, bahawa GC yang diketuai oleh responden pada masa material adalah cuai kerana gagal untuk melindungi hak Chinwoo kepada 23% daripada jumlah keseluruhan unit-unit yang dibina. GC yang diketuai oleh perayu memeriksa laporan ICE tersebut dan memutuskan, antara lain, untuk menghantar salinan-salinan laporan tersebut kepada Majlis Peguam Malaysia ('BC'), Agensi Pencegahan Rasuah ('ACA') pada ketika itu dan Pendaftar Persatuan ('ROS'). Perayu memberitahu GC bahawa mengikut resolusi 2003 tersebut, dia akan menyerahkan laporan ICE tersebut kepada ROS, BC, ACA dan juga kepada bahagian jenayah komersial polis ('CCD'). Ahli-ahli GC tidak membantah kepada tindakan yang dicadangkan olehnya. Melalui surat-surat berasingan ('surat-surat yang dipersoalkan'), perayu menghantar laporan ICE tersebut kepada lembaga tatatertib ('DB') Majlis Peguam dan juga kepada BC, ACA, ROS dan CCD untuk tindakan mereka selanjutnya. Dia kemudiannya melaporkan tindakannya kepada AGM Chinwoo. Secara keseluruhannya, perayu dalam surat-surat yang dipersoalkan tersebut mendakwa bahawa responden mungkin melakukan pecah amanah jenayah dan fraud, melanggar etika profesional sebagai peguam, salah guna kuasanya sebagai presiden Chinwoo dan telah cuai. Responden memfailkan tindakan fitnah terhadap perayu yang mana membawa kepada rayuan ini. Dalam setiap kes, Mahkamah Tinggi mengesahkan tuntutan responden, menolak pembelaan mutlak perayu dan/atau perlindungan bersyarat dan/atau justifikasi dan mengawardkan responden ganti rugi am, tambahan dan teladan. Mahkamah memutuskan bahawa tidak satupun pembelaan yang membela perayu kerana tindakannya tidak mempunyai mandat AGM Chinwoo atau GCnya; bahawa dia gagal untuk membuktikan kebenaran tuduhan yang dibuatnya di dalam surat-surat yang dipersoalkan, yang mana sebahagian besarnya atas syak wasangka; dan bahawa tindakannya adalah berniat jahat atau mala fide. Mahkamah Rayuan ('MR') bersetuju dengan dapatan Mahkamah Tinggi dan menolak rayuan-rayuan perayu. Salah satu soalan yang mana Mahkamah Persekutan berikan perayu izin untuk merayu adalah sama ada keputusan Mahkamah Persekutuan dalam kes *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ('Lee Yoke Yam') — yang mana memutuskan bahawa atas pertimbangan polisi awam, laporan polis di Malaysia dilindungi oleh perlindungan mutlak — patut digunapakai untuk mendapatkan perlindungan yang sama kepada tuduhan fitnah yang dibangkitkan di dalam surat-surat yang dipersoalkan kepada ROS,

ACA dan CCD kerana, seperti laporan polis, tujuan membuat laporan/aduan dengan ROS, ACA dan CCD adalah untuk membolehkan badan-badan tersebut menyiasat kesalahan yang didakwa dan untuk mengambil tindakan wajar terhadap orang yang bersalah. Responden, walau bagaimanapun, berhujah bahawa bukan sahaja *Lee Yoke Yam* digunapakai kepada kes ini tetapi keputusan di dalam kes *Lee Yoke Yam* patut disemak semula untuk menyatakan bahawa laporan polis hanya perlu diberikan perlindungan bersyarat.

Diputuskan, membenarkan rayuan-rayuan dan mengenepikan keputusan-keputusan mahkamah bawahan:

(1) Mahkamah ini mendapati tiada alasan untuk menyimpang daripada keputusannya di dalam kes *Lee Yoke Yam* bahawa, di Malaysia, atas pertimbangan polisi awam, laporan polis dilindungi oleh perlindungan bersyarat. Ratio di dalam kes *Lee Yoke Yam* patut digunapakai kepada aduan yang dibuat dengan ACA, CCD dan ROS konsisten dengan prinsip bahawa keadaan untuk membuat aduan sedemikian juga adalah keadaan perlindungan bersyarat. ACA, CCD dan ROS berkongsi ciri umum yang mana mereka adalah diberi kuasa secara statutori untuk menyiasat kesalahan yang didakwa dan untuk mengambil tindakan yang sewajarnya terhadap orang yang bersalah. Laporan ACA sama seperti laporan polis; aduan yang dibuat dengan CCD pada dasarnya adalah laporan polis memandangkan CCD adalah sebahagian polis; dan di bawah Akta Pertubuhan 1966, ROS dibenarkan untuk mendakwa kesalahan-kesalahan tertentu di bawah Akta. Tidak terdapat perbezaan bermakna di antara aduan/laporan yang dibuat dengan polis dan satu yang dibuat dengan ACA, CCD atau ROS kerana mereka semua dikawal oleh pertimbangan yang sama. Unsur umum dalam surat-surat yang dipersoalkan adalah permintaan kepada pihak-pihak berkuasa berkaitan untuk menyiasat dan untuk mengambil tindakan, jika wajar (lihat perenggan 34, 37–39 & 41).

(2) Mahkamah bawahan salah arah diri dalam memutuskan bahawa pembelaan perlindungan mutlak dan perlindungan bersyarat tidak boleh digunakan oleh perayu kerana dia telah menghantar surat-surat yang dipersoalkan tersebut tanpa kuasa atau mandat. Pembelaan perlindungan mutlak digunapakai di mana kepentingan utama adalah pentadbiran keadilan dan polisi awam utama yang sepatutnya bahawa siapa yang membuat aduan patut bebas untuk membuatnya. Kuasa atau mandat bukan pertimbangan perlu untuk pembelaan perlindungan mutlak beraplikasi (lihat perenggan 42–44).

(3) Surat yang dihantar oleh perayu kepada adalah prima facie keadaan perlindungan bersyarat. Perayu secara jelas mempunyai kepentingan untuk menyerahkan kepada BC untuk perhatiannya aduan yang dihantar olehnya kepada DB. BC mempunyai kepentingan atau

kewajipan yang sama untuk menerima komunikasi kerana responden adalah peguambela dan peguamcara. Perlindungan bersyarat bergantung ke atas keadaan di mana komunikasi dibuat dan bukan komunikasi itu sendiri. Keadaan perlindungan bersyarat adalah keadaan di mana orang yang membuat komunikasi mempunyai kepentingan atau kewajipan undang-undang, sosial atau moral untuk membuatnya kepada orang yang mana ia dibuat, dan orang yang mana ia dibuat mempunyai kepentingan dan kewajipan yang sama untuk menerimanya (lihat perenggan 46 & 53).

(4) Mahkamah bawahan mendapati bahawa ketiadaan mandat untk membuat aduan adalah dengan sendiri mencukupi untuk membuktikan niat jahat. Walau bagaimanapun, mahkamah ini mendapati bahawa minit-minit AGM 2003 dan mesyuarat GC pada 2 November 2004 menunjukkan bahawa terdapat m andat yang mencukupi untuk perayu membuat aduan. Tindakan semata-mata perayu memfailkan aduan tersebut dengan pelbagai pihak berkuasa relevan, adalah tidak mencukupi untuk membuktikan niat jahat. Responden telah gagal untuk membuktikan bahawa perayu digerakkan oleh niat jahat (lihat perenggan 57–58).]

Notes

For cases on absolute privilege, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 378–384.

Cases referred to

Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim [2011] 4 MLJ 346, CA (refd)

Adam v Ward [1916–17] All ER Rep 157; [1917] AC 309, HL (refd)

Beach and another v Freeson [1971] 2 All ER 854, QBD (refd)

Buckley v Dalziel and another [2007] 1 WLR 2933; [2007] EWHC 1025, QBD (refd)

D v National Society for the Prevention of Cruelty to Children [1977] 1 All ER 589; [1978] AC 222, HL (refd)

Dato' Annas bin Khatib Jaafar v The New Straits Times Press (M) Bhd & Ors [2013] 10 MLJ 640; [2013] 4 CLJ 96, HC (folld)

Dunnet v Nelson 1926 SC 764 (folld)

Emperor v Khwaja Nazir Ahmad (1945) 47 BOMLR 245; AIR 1945 PC 18, HC (refd)

Goh Lay Khim and Others v Isabel Redrup Agency Pte Ltd and Another Appeal [2017] 1 SLR 546; [2017] SGCA 11, CA (refd)

Horrocks v Lowe [1974] 1 All ER 662; [1975] AC 135, HL (refd)

Isabel Redrup Agency Pte Ltd v AL Dakshnamoorthy and others and another suit [2016] 2 SLR 634; [2016] SGHC 30, HC (refd)

Lee Yoke Yam v Chin Keat Seng [2013] 1 MLJ 145, FC (folld)

Lincoln v Daniels [1962] 1 QB 237, CA (folld)
Muthusami Naidu vs Unknown, In Re (1914) ILR 37 Mad 110; AIR 1914 Madras 472, HC (refd)
Royal Aquarium and Summer and Winter Garden Society, Limited v Parkinson (1892) 1 QB 431, CA (refd)
Sharifuddin Mohamed & Anor v Dato' Annas bin Khatib Jaafar [2016] MLJU 1729; [2016] 3 CLJ 574; [2016] 1 LNS 1, CA (refd)
Swain v Law Society [1982] 2 All ER 827, HL (refd)
Taylor and others v Serious Fraud Office and others [1998] 4 All ER 801; [1999] 2 AC 177; [1998] 3 WLR 1040, HL (refd)
The Punjabi Bagh Cooperative v KL Kishwar And Anr 2002 (61) DRJ 594, HC (refd)
Toogood v Spyring (1834) 149 ER 1044; (1834) 1 CM & R 181; [1834] EngR 363; (1834) 1 CrM & R 181 (refd)
Wescott v Wescott [2008] EWCA Civ 818, CA (refd)

Legislation referred to

Criminal Procedure Code ss 107, 112
Legal Profession Act 1976 ss 47(1), 57
Societies Act 1966 s 61

Appeal from: Civil Appeal Nos W-02–1700–07 of 2012, W-02–1662–07 of 2012, W-02–18–01 of 2013 and W-02–1701–07 of 2012 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Robert Low, Surendra Ananth and Helen Lim with him) (Ranjit Ooi & Robert Low) for the appellant.
Chan Tse Yuan (Michael Teo, Lee Siew Lin, Tan Foong Luen and Koh Xiao Xuan with him) (Lim Fung Yin & Co) for the respondent.

Aziah Ali FCJ (delivering judgment of the court):

INTRODUCTION

[1] There are four appeals heard before us. These appeals are against the decision of the Court of Appeal dated 3 December 2014 in Civil Appeal No W-02–1701–07 of 2012 which was heard together with Civil Appeal Nos W-02–18–01 of 2013, W-02–1662–07 of 2012 and W-02–1700–07 of 2012.

[2] The Court of Appeal dismissed the appellant's appeals (save for interest and costs) and affirmed the decision of the High Court dated 8 August 2012 allowing the respondent's claims against the appellant for defamation. The High Court awarded general damages, exemplary damages and aggravated damages against the appellant.

[3] The respondent's claims against the appellant were in respect of a police report and letters of complaint lodged by the appellant with the Commercial Crime Division, Kuala Lumpur ('CCD'), the Disciplinary Board ('DB'), the Bar Council Malaysia ('BC'), the Anti-Corruption Agency ('ACA') and the Registrar of Societies ('ROS').

QUESTIONS OF LAW

[4] On 6 October 2015 this court granted leave to appeal on five questions of law which were consolidated by the learned counsel for the appellant as follows:

(1) whether the lodging or writing of letter/s of complaint/s to the ROS/ACA/CCD were occasions of absolute privilege, consonant and/or consistent with the principle set out by the Federal Court in *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ('Lee Yoke Ham')?

(2) whether the issue of authority was a relevant or necessary consideration for absolute privilege to apply?

(3) whether the lodging or writing of letter/s of complaint/s to the ROS/ACA/CCD/BC were, prima facie, occasions of qualified privilege?

(4) whether malice as contemplated in the authority of *Horrocks v Lowe* [1974] 1 All ER 662 ('Horrocks') may be inferred from the failure on the part of the defendant to take steps that he is not obliged to in law for the purpose of defeating the defence of qualified privilege; and

(5) whether a High Court is empowered to award aggravated and/or exemplary damages in respect of a series of defamatory remarks premised upon the same factor raised or contended by a plaintiff?

BACKGROUND FACTS

[5] At the material time the appellant was the President of Chinwoo Athletic Association Selangor and Kuala Lumpur ('Chinwoo'). The appellant became the President of Chinwoo in 2001. He succeeded the respondent who was the immediate past president of Chinwoo.

[6] The respondent is an advocate and solicitor and the founder of the legal firm Messrs TC Chong & Rakan-Rakan. The respondent was the President of Chinwoo from 30 June 1991–24 June 2001. Prior to that, the respondent was the Vice President of Chinwoo from 1983–1988. He was a member of the Chinwoo Property Committee ('CPC') from 1984 and became Chairman of the CPC from 1989–1990. He was the Deputy President of Chinwoo from 1989–1991.

[7] Chinwoo was the registered owner of a parcel of land known as GRT 2643 Lot 27, Section 69, Bandar Kuala Lumpur ('the land'). By a resolution made at Chinwoo's extraordinary general meeting ('EGM') on 22 April 1984, the members resolved to enter into a joint venture with one Jiwa Realty Sdn Bhd ('the developer') to develop the land ('the project'). A B

[8] In 1985 and 1986 Chinwoo entered into two sale and purchase agreements with the developer. Pursuant to the 1985 sale and purchase agreement ('the 1985 SPA') Chinwoo agreed to sell the land to the developer and in return, according to the 1986 sale and purchase agreement ('the 1986 SPA'), the developer agreed to sell 23% of the units developed in the project to Chinwoo. This reflected the agreed sharing ratio of 23:77. However no development took place. C

[9] On 30 June 1991 by an extraordinary general meeting ('EGM'), it was decided that the 1985 and 1986 SPAs be revoked and a new agreement be entered with the developer. The respondent was then the president of Chinwoo. At this EGM it was decided that the total number of units was 669. Chinwoo would purchase 154 units and 159 car park bays. The 154 units represented 23% of the 669 pre-determined total and reflected the sharing ratio 23:77 that had been agreed previously. D E

[10] On 26 March 1992, the 1985 and 1986 SPAs were revoked. On the same date Chinwoo and the developer entered into two new sale and purchase agreements ('the 1992 SPAs'). One agreement was for the sale of the land by Chinwoo to the developer and the other was for the purchase of one block of 154 units and 159 car park bays by Chinwoo from the developer. The parties also entered into an additional supplemental agreement on the same date ('the additional agreement') which contained a new clause allowing the developer to develop the land 'in whatever manner it may deem fit' ('the free hand clause'). The additional agreement reveals that the trustees of Chinwoo had agreed to the free hand clause. The respondent was a trustee of Chinwoo then. He was also a member of the Chinwoo Property Committee ('CPC'). The 1992 SPAs and the additional agreement were drawn up by the respondent's legal firm. F G H

[11] On 14 June 1998 the apartment block containing 154 units and 159 car park bays were handed over to Chinwoo. Some members then realised that the 154 units was less than 23% of the agreed sharing ratio because, during the development of the project, and by virtue of the free hand clause, the developer had obtained approval from the authorities to build an additional 201 units. Thus the total number of units built was 870 and not 669 units. The members were unhappy that the developer was given a free hand to develop its portion of the project as they saw fit which ultimately deprived Chinwoo of 46 units. I

[12] At the Annual General Meeting ('AGM') on 29 June 2003 ('the 2003 AGM'), a unanimous resolution was passed ('the 2003 resolution') directing Chinwoo's General Committee ('GC') to investigate the project to determine whether there were any irregularities. The GC is the highest decision-making body in between general meetings of members. The GC comprises the President, Deputy President, two Vice Presidents and 22 committee members. During the debate leading to the resolution, the respondent had suggested that an independent committee be set up to investigate the project.

[13] The 2003 resolution as contained in the minutes of the AGM reads, amongst others, as follows:

> ... unanimously directed the new general committee to investigate the real facts of the development of Chinwoo Court, whether what our Association got is fair and conform to the principle win-win, if it is found that something is questionable, get advice from our Association's legal adviser, contact the relevant department and authorities and take appropriate action.

[14] Subsequent to the 2003 AGM, the GC established an Independent General Committee ('ICE') comprising of individuals who were not members of Chinwoo. ICE conducted its investigations based on documents provided by the secretariat of Chinwoo. No member was called for an interview or inquiry. In its qualified report ('the ICE report'), ICE found, amongst others, that:

(a) the GC which was led by the respondent at the material time was in breach of its duty to Chinwoo and was negligent in failing to protect Chinwoo's entitlement to 23% of the constructed units and these acts of breach of duty and negligence might be actionable by Chinwoo;

(b) on the documents there was no evidence that any member of the GC or any other individual had committed any criminal act; and

(c) a civil claim be commenced against the developer for liquidated damages for late delivery of the Chinwoo's units.

[15] On 2 November 2004 the meeting of the GC scrutinised the report by ICE and decided, amongst others, that the ICE report be submitted to the BC, the ACA and the ROS. On 29 March 2005 the GC agreed to table the ICE report during the upcoming AGM. The appellant also informed the GC that, in accordance with the 2003 resolution, he would forward the ICE report to the ROS, BC, ACA and CCD. No objection was raised by the members of the GC.

[16] The appellant sent the ICE report to the CCD and the DB under two separate cover letters dated 18 May 2005 and 25 May 2005 respectively. On

31 May 2005 he reported this to the GC. He also informed the GC that he would seek legal advice before submitting the said report to the ACA. The appellant sent the report and the letters of complaint to the BC, ACA, police and ROS on 8 June 2005, 9 June 2005, 13 June 2005 and 16 June 2005 respectively. During the AGM on 26 June 2005 the appellant informed the members that following the 2003 resolution, he had sent the ICE report to these authorities for further action and investigation.

[17] In the letters sent to the various authorities ('the impugned letters'), the appellant had, amongst others, alleged fraud, misuse of power and breach of trust and had named the respondent as the president of Chinwoo and who had held material positions in Chinwoo during the development of the project. The appellant's acts led to the filing of the numerous defamation actions against him by the respondent. The appellant's defence is primarily absolute and/or qualified privilege, and/or justification.

THE HIGH COURT

[18] The trial judge found that the impugned letters were defamatory of the respondent and that all the defences raised were not available to the appellant.

[19] On the defence of absolute privilege, the trial judge states as follows:

> Dengan beliau menulis kelima-lima aduan dan laporan polis berkenaan tanpa mendapat mandat dari Persatuan Chinwoo, saya berpandangan apa yang beliau lakukan adalah salah dan melanggar peraturan Persatuan Chinwoo, maka dengan itu aduan-aduan dan laporan polis berkenaan tidak boleh dipertimbangkan untuk mendapat perlindungan secara mutlak.
>
> Untuk sesuatu aduan dan laporan polis untuk mendapat perlindungan secara mutlak, aduan-aduan dan laporan polis itu sendiri hendaklah keluar dari sumber yang sah dan di dalam tindakan ini perlu mendapat mandat dari ahli-ahli Persatuan Chinwoo dahulu atau resolusi dari AGM 2003 dan juga Mesyuarat GC pada 2 November 2004.

[20] In respect of the defence of qualified privilege, the trial judge states as follows:

> Setelah meneliti keseluruhan keterangan di dalam kes ini, mahkamah berpendapat bahawa defendan gagal untuk buktikan wujudnya keadaan yang dilindungi. Alasan utama mengapa mahkamah berpendapat demikian adalah bahawa kerana kelima-lima aduan dan laporan polis berkenaan merupakan aduan-aduan dan laporan polis yang dibuat tanpa mendapat kelulusan atau tanpa resolusi dari Ahli-Ahli Persatuan Chinwoo melalui AGM 2003 mereka dan Mesyuarat GC pada 2 November 2004.
>
> Pengataan di dalam kelima-lima aduan dan laporan polis yang diterbitkan atau disiarkan oleh defendan kepada pihak ketiga, dengan tidak mendapat mandat

melalui resolusi dari AGM 2003 Persatuan Chinwoo dan Mesyuarat GC berkenaan, saya berpendapat pembelaan perlindungan bersyarat tidak terpakai dalam keadaan begini.

Dengan defendan tidak mendapat mandat dari Ahli-Ahli Persatuan Chinwoo juga resolusi dari AGM 2003 dan Mesyuarat GC pada 2 November 2004 untuk membuat kelima-lima aduan dan laporan polis maka secara per se telah membuktikan niat jahat di pihak Defendan.

[21] On the defence of justification, the trial judge states as follows:

Pihak defendan semasa disoalbalas mengaku bahawa alegasi beliau terhadap plaintif terutamanya untuk pecah amanah jenayah, frod dalam kesemua aduan defendan adalah berdasarkan pada syak wasangka. Defendan juga akui bahawa tidak terdapat dalam minit EGM 1991 atau Resolusi 1991 dinyatakan yang Chinwoo berhak kepada 23% jumlah keseluruhan unit yang akan dibina dalam projek berkenaan.

Her Ladyship then concludes as follows:

Isu mengenai dengan kebebasan pemaju untuk memajukan hartanah pada bahagian hartanah yang diperuntukkan untuk mereka adalah tidak relevan dalam tindakan fitnah ini. Defendan gagal tunjukkan yang mereka mempunyai pembelaan justifikasi yang bermerit di dalam tindakan ini.

THE COURT OF APPEAL

[22] The appellant appealed to the Court of Appeal. By a unanimous decision, the Court of Appeal dismissed the appellant's appeals and agreed with the trial judge that the defence of absolute privilege and qualified privilege were not available to the appellant because the appellant had sent the impugned letters without the authority or mandate or resolution of the AGM 2003 and the GC meeting on 2 November 2004. On the defence of justification, the Court of Appeal agreed with the trial judge that the appellant had failed to prove that the allegations made in the impugned letters were true and that the lack of mandate showed that the appellant had mala fide intent in writing the impugned letters and lodging the police report.

BEFORE THIS COURT

Appeal Nos 02(f)-73–10 of 2015(W); 02(f)-74–10/2015(W) and 02(f)-76–10 of 2015(W)

Whether the lodging or writing of letter/s of complaint/s to the ROS/ACA/CCD were occasions of absolute privilege, consonant and/or consistent with the principle set out by the Federal Court in *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ('Lee Yoke Ham') (Question 1)

[23] In *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 the Federal Court held that '... absolute privilege should be extended to a statement contained in a police report lodged under s 107 of the CPC as in the case of statement made under s 112 of the CPC'. The ratio in *Lee Yoke Ham* as expressed in the judgment of the Federal Court through Arifin Zakaria, CJ (as he then was) is as follows:

> ... The underlying reason behind this, is the overriding public interest that a member of the public should be encouraged to make police report with regard to any crime that comes to his or her notice. Such report is important to set the criminal investigation in motion. With such report, the alleged crime may be investigated and the perpetrator be brought to justice.
>
> It is without doubt that public interest should override the countervailing consideration that this may sometime lead to an abuse by a malicious informant. In any event, if a false report is lodged by a complainant, he is liable to be prosecuted for making false report under ss 117, 182 or 203 of the Penal Code. That we believe provides a sufficient safeguard against any person from making a false report.

[24] The thrust of the submissions made by learned counsel for the appellant before us is that the ratio in *Lee Yoke Yam* should apply to the complaints lodged by the appellant with the CCD, the ACA and the ROS. It is submitted that considerations that govern the lodging of general police reports similarly apply to the lodging of reports or complaints with the ACA, the CCD and the ROS. The ACA, the CCD and the ROS are conferred with the power to investigate wrong doings under their respective laws and the power to take enforcement action. The purpose of lodging reports or complaints with these authorities is to bring to their attention possible unlawful conduct and to urge these authorities to investigate and to take action, if appropriate. Therefore the ratio in *Lee Yoke Yam* ought to be extended to letters of complaints lodged with the ACA, the CCD and the ROS.

[25] For the respondent the learned counsel submitted that the decision in *Lee Yoke Yam* did not apply to the present appeals because the present appeals do not concern any police report. According to learned counsel, read as a whole, *Lee Yoke Yam* shows that police reports per se are merely accorded with the status of qualified privilege and demonstrates that a police report and a statement contained in a police report which is not with regard to any crime or which cannot set a criminal investigation in motion does not fall within the ambit of the decision in *Lee Yoke Yam.*

[26] Learned counsel urged this court to reconsider the case of *Lee Yoke Yam* and not to extend the ratio in *Lee Yoke Yam* to letters of complaints sent to the CCD, the ACA and the ROS. To this end and after the hearing of these appeals had been completed, learned counsel for the respondent had forwarded for our consideration the recent decisions by the Singapore High Court and Court of

Appeal in *Goh Lay Khim and Others v Isabel Redrup Agency Pte Ltd and Another Appeal* [2017] 1 SLR 546; [2017] SGCA 11 and *Isabel Redrup Agency Pte Ltd v AL Dakshnamoorthy and others and another suit* [2016] 2 SLR 634; [2016] SGHC 30. *Goh Lay Khim* is the decision of the Singapore Court of Appeal on an appeal from the decision of the High Court in *Isabel Redrup Agency Pte Ltd.*

[27] We have given careful and anxious consideration to the submissions made by learned counsel for the parties. However before we proceed further, we feel that it is necessary to address some issues raised by learned counsel for the respondent before us including his submissions that the case of *Lee Yoke Ham* shows that police reports *per se* are merely accorded with the status of qualified privilege.

Police report

[28] In the case of *Goh Lay Khim,* one of the issues before the Singapore Court of Appeal was whether absolute privilege covers gratuitous complaints to the authorities. The Singapore Court of Appeal was of the considered view that the balance between freedom of expression and protection of reputation depends on local political and social conditions and held that, in the context of Singapore, gratuitous complaints to prosecuting authorities should be protected by qualified privilege only. In the judgment delivered by Judith Prakash JA, Her Ladyship said:

> A balance must be struck between the freedom of speech and the protection of reputation. In this regard, the foreign authorities that have been cited in respect of absolute privilege must be viewed with some circumspection since the balance between freedom of expression and protection of reputation depends on local political and social conditions .... It must not be readily assumed that the foreign judicial pronouncements on defamation should apply in our local context without modification. The determination of 'necessity' is an exercise that must be carried out in the context of a particular society and its mores, values and expectations of the proper behavior of its members.

Her Ladyship said further:

> In our judgment, in Singapore, the suggested extension to the scope of absolute privilege would be wholly disproportionate to and unnecessary for the aim of encouraging members of the public to report suspected wrongdoings.

[29] In *Lee Yoke Yam*, the appellant's counsel in that case had made submissions similar to the submissions made by respondent's counsel in the present appeals that police reports are only protected by qualified privilege. In para 21 of the judgment it is stated as follows:

> [21] Counsel for the appellant submitted that *Abdul Manaf bin Ahmad*'s case was

wrongly decided and urged this court to restore the long standing position that such statement is only protected by qualified privilege. A

The submissions did not find favour with the Federal Court. The Federal Court agreed with the decision of the Court of Appeal in *Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim* [2011] 4 MLJ 346. In that case, Gopal Sri Ram JCA (as he then was) had said as follows: B

[4] ... There is no doubt that defamatory statements in police reports must attract the defence of absolute privilege for reasons of public policy. If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk ... C

[30] A police report lodged under s 107 of the Criminal Procedure Code ('the CPC') and commonly known as a 'first information report' ('FIR') is a report that is drawn up by a police officer upon receiving information about the commission of an offence. Section 107 of the CPC states as follows: D

(1) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant. E

[31] The FIR is made to provide the police early information of criminal activity. In *Emperor v Khwaja Nazir Ahmad* (1945) 47 BOMLR 245; AIR 1945 PC 18, Lord Porter in delivering the judgment of the Privy Council said: F

10. In truth the provisions as to an information report (commonly called a first information report) are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and it has to be remembered that the report can be put in evidence when the informant is examined if it is desired to do so. G

[32] In the case of *In Re: Muthusami Naidu vs Unknown* (1914) ILR 37 Mad 110; AIR 1914 Madras 472, the question for decision was whether a defamatory statement made by one person regarding another in a complaint presented by the former against the latter is absolutely privileged. The court said as follows: H

We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceedings. If the complaint is false, then the defendant would be entitled to prosecute the complainant for preferring a false charge. We think the proper rule to lay down is that a statement contained in a complaint should be held to be absolutely privileged. I

[33] The Federal Court in *Lee Yoke Yam* had cited with approval the case of *Taylor and others v Serious Fraud Office and others* [1998] 4 All ER 801; [1999] 2 AC 177; [1998] 3 WLR 1040 wherein the House of Lords held that persons who take part in the administration of justice require nothing less than absolute immunity from suit. In that case, the defendant had requested the Isle of Man authorities to investigate the part, if any, taken by the plaintiff in a major fraud. No charges were brought against the plaintiff. The plaintiff sought damages in defamation. Lord Hoffmann said:

> I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. Persons assisting the police with their inquiries may not be able to give any admissible evidence; for example, their information may be hearsay, but none the less valuable for the purposes of the investigation. But the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial.

We respectfully agree with the views expressed by Lord Sands in *Dunnet v Nelson* 1926 SC 764 as follows:

> It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interest of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of actions for slander.

[34] For the reasons stated above, we find no ground to depart from the decision in *Lee Yoke Yam*. It behoves this court to reiterate that, in Malaysia, on public policy consideration, a police report is protected by absolute privilege.

Malicious complainant

[35] Another issue raised by learned counsel for the respondent is the issue of a malicious complainant. We find that this issue was addressed by Ward LJ in *Wescott v Wescott* [2008] EWCA Civ 818 (which was cited with approval in *Lee Yoke Yam*) when His Lordship referred to the judgment of Lord Simon of Glaisdale in the case of *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589; [1978] AC 222. We take the liberty of reproducing the relevant passage of the judgment of Ward LJ in *Wescott v Wescott* as follows:

> ... The answer to the argument that immunity should not give protection to a

malicious informer was tellingly given by Lord Simon of Glaisdale in *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at p 607; [1978] AC 222 at p 233:

> I cannot leave this particular class of relevant evidence withheld from the court (the identity of the informer who gave information of ill treatment of children to the NSPCC) without noting, in view of an argument for the respondent, that the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested or even demented police informant as much as one who brings information from a high-minded sense of civic duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused, the balance of public advantage lies in generally respecting it.

We respectfully adopt the view expressed by Devlin LJ in the case of *Lincoln v Daniels* [1962] 1 QB 237 where His Lordship said, amongst others, as follows:

> Absolute privilege is granted only as a matter of public policy and must therefore on principle be confined to matters in which the public is interested and where therefore it is of importance that the whole truth should be elicited even at the risk that an injury inflicted maliciously may go unredressed.

Republication

[36] Learned counsel for the respondent had also raised concern over the issue of republication of a police report or a statement in a police report. However republication does not arise for our consideration since it is not an issue in these appeals. We will however venture to state that it is trite that a person who repeats another's defamatory statement without privilege may be held liable for republishing the same libel or slander.

[37] Reverting to the question posed before us, we have perused the impugned letters in the present appeals. In the case of the appellant's letter to the ACA, the appellant had alleged probable misuse of power by the respondent as President of Chinwoo and breach of trust. In the letter to the CCD, it is an allegation of probable criminal breach of trust or fraud. In the letter to the ROS, the appellant had alleged negligence on the part of the respondent and the GC based on the ICE report and probable breach of trust and professional ethics. Thus the common vein in these letters is the request for these authorities to carry out investigations and to take action, if appropriate.

[38] The ACA, the CCD and the ROS share a common feature in that they are statutorily empowered with investigative powers and to take appropriate action under the law against those who have breached the respective legislations applicable to them. We agree with the submissions by appellant's counsel that there is no meaningful difference between a complaint or report lodged with the police and a complaint or report lodged with the ACA, the CCD or the

ROS. As submitted by learned counsel for the appellant, similar considerations govern the lodging of reports or complaints with the ACA, the CCD and the ROS as the lodging of general police reports. The purpose is to notify these authorities of alleged unlawful conduct and to set an investigation in motion and, if appropriate, to take the necessary action against the alleged wrongdoer.

[39] In respect of complaints lodged with the ACA, we agree with the High Court judge in the case of *Dato' Annas bin Khatib Jaafar v The New Straits Times Press (M) Bhd & Ors* [2013] 10 MLJ 640; [2013] 4 CLJ 96 that ACA reports are akin to police reports (see also *Sharifuddin Mohamed & Anor v Dato' Annas bin Khatib Jaafar* [2016] MLJU 1729; [2016] 3 CLJ 574; [2016] 1 LNS 1). In respect of a complaint lodged with the CCD, such a complaint is in essence a police report since the CCD is part of the police. With regard to the ROS, the Societies Act 1966 (Act 335) allows the ROS to prosecute for certain offences under the Act (see s 61 of Act 335).

[40] In the appellant's counsel written submissions, the Delhi High Court case of *The Punjabi Bagh Cooperative v KL Kishwar And Anr* 2002 (61) DRJ 594 was cited in support of the submissions that absolute privilege also extends to the appellant's letter of complaint to the ROS. In that case, the society and its office bearers had filed a suit for defamation against the defendants, who were members of the society. The defamatory statements were contained in various petitions filed by the defendants with the Joint Registrar of the Cooperative Societies. The second defendant then filed an application seeking rejection of the suit on the ground that the suit was not maintainable because the alleged defamatory statements were made in connection with the affairs of the society and such communications/petitions were privileged communications, so no civil action of defamation will lie. In his judgment Dwivedi J said, amongst others, as follows:

> ... If a member of the society has reason to believe that some irregularity, illegality is being committed in the running of the affairs of the society, such member of the society is under a duty to bring it to the notice of the office bearer of the society or other authorities having control over the society. Such member will have an obligation cast on him to bring such things to the notice of the society and vice versa office bearers or other such authorities will be under obligation to receive such complaints and look into them ...
>
> ... I think the alleged defamatory statements made by the defendants in their various communications/petitions to the plaintiffs or to the Joint registrar or other authorities having control over the aforesaid Society fall in the category of privileged communications and no action for defamation will be maintainable ...

[41] For the reasons that we have set out, we agree with learned counsel for the appellant that the ratio in *Lee Yoke Yam* ought to be applied to complaints made with the ACA, the CCD and the ROS; consistent with the principle set

out therein that the lodging of such complaints are occasions of absolute privilege.

Whether the issue of authority was a relevant or necessary consideration for absolute privilege to apply? (Question 2)

[42] The courts below found that the appellant had sent the impugned letters without authority or mandate and therefore the defence of absolute privilege and qualified privilege were not available to the appellant. We agree with learned counsel for the appellant that the courts below had misdirected themselves on this issue.

[43] The defence of absolute privilege applies where the primary interest is the due administration of justice and the overriding public policy that those who have complaints should be free to make them. The case of *Wescott v Wescott* shows that even informants are entitled to the benefit of absolute privilege. Ward LJ said as follows:

> Because society expects that criminal activity will be reported and when reported investigated and, when appropriate, prosecuted, all those who participate in a criminal investigation are entitled to the benefit of absolute privilege in respect of the statements which they make. That applies whether they are informants, investigators, or prosecutors ...

In *Buckley v Dalziel and another* [2007] 1 WLR 2933; [2007] EWHC 1025 (QB), Eady J said that '... public policy consideration applies with equal validity to those who are mere witnesses and to those who are initial complainants ...'. Clearly, these statements negate the requirement of authority/mandate before the defence of absolute privilege can apply. To decide otherwise would be contrary to the principle that underlies the defence of privilege that those who have complaints should be free to make them.

[44] Consequently we are unable to agree with the courts below that authority or mandate is a necessary consideration for the defence of absolute privilege to apply.

Appeal No 02(f)-75–10 of 2015(W)

Whether the lodging or writing of letter/s of complaint/s to the ROS/ACA/CCD/BC were, prima facie, occasions of qualified privilege (Question 3)

[45] In question 1 we have resolved that complaints lodged with the ACA, the CCD and the ROS were occasions of absolute privilege. The only issue

remaining for consideration in this question is the appellant's contention that the letter sent by the appellant to the BC is prima facie an occasion of qualified privilege.

[46] Qualified privilege depends on the occasion upon which the communication is made, and not the communication itself. A qualified privilege occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. If the communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it, the occasion is said to be one of qualified privilege. Whether an occasion is a privileged occasion depends on the circumstances of each case, the nature of the information and the relation of speaker and recipient. It is for the judge alone to determine as a matter of law whether the occasion is privileged (*Adam v Ward* [1916–17] All ER Rep 157; [1917] AC 309).

[47] The appellant herein had sent the letter to the BC because the respondent is an advocate and solicitor. The appellant had requested the BC to look into the complaint that he had sent to the DB regarding irregularities in the development of the project and to take appropriate action.

[48] It was submitted for the appellant that, being the President of Chinwoo at the material time, the appellant had a social and moral duty to make the complaint to the BC which is tasked with the duty to properly manage the affairs of the Malaysian Bar and to take cognizance of anything affecting the Malaysian Bar or the professional conduct of its members (ss 47(1) and 57 of the LPA). The purpose of vesting statutory functions in the BC is the protection of the public and to act in the best interest of the public (see *Swain v Law Society* [1982] 2 All ER 827).

[49] The English cases of *Lincoln v Daniels* [1962] 1 QB 237 and *Beach and another v Freeson* [1971] 2 All ER 854 were referred to in the written submissions of the appellant's counsel to support the contention that the publication of a complaint to the BC was an occasion of qualified privilege.

[50] In the case of *Lincoln v Daniels* the defendant had claimed absolute immunity in respect of communications sent by him to the English Bar Council alleging professional misconduct by the plaintiff, a Queen's Counsel. Disciplinary proceedings against barristers were at that time conducted by Benchers of their respective Inns. It was held that initial communications sent to the secretary of the Bar Council alleging professional misconduct by a barrister did not attract absolute privilege, since they were not yet a step in an

inquiry before an inn of court. Devlin LJ concluded that it was sufficient for complaints to the Bar to be covered by qualified privilege since it was not a practical necessity for complaints about barristers to be channeled through the Bar Council even though it was convenient to do so. In the same case it was held that absolute privilege will apply in respect of disciplinary proceedings conducted by the Benchers of the Inns. Danckwerts LJ said:

> I do not think that the absence of a statutory foundation or of some of these features such as the taking of evidence on oath need be fatal to the recognition of a tribunal as a judicial body to which it is necessary in the interests of a proper and complete hearing to attach the protection of absolute privilege. It seems to me that in the case of proceedings which may result in the deprivation of a barrister of the right to practise his profession, it is desirable that a judicial determination of the matters by the Benchers of his Inn should be as free from harassing consequences as that of a military court of inquiry or the proceedings before the Disciplinary Committee of the Law Society.

[51] In *Beach and another v Freeson* the defendant was a member of Parliament who was informed by one of his constituents that his constituent's solicitors, the plaintiffs, had grossly mismanaged his constituent's affairs and the affairs of his relations. The constituent set out his complaints in a long letter to the defendant. The defendant was requested to refer the matter to the Law Society. The defendant wrote a letter to the Law Society and reproduced the complaints. He sent a copy of the letter to the Lord Chancellor. The defendant was sued for libel. The defendant claimed that his publication to the Law Society and the Lord Chancellor were protected by qualified privilege on the ground that as a member of Parliament, he had a duty or interest in passing on his constituent's complaint and the Law Society and the Lord Chancellor had a reciprocal interest in receiving it. Geoffrey Lane J held that the reciprocal interest or duty of the Law Society in receiving the complaint cannot be in doubt and the publication to the Law Society was the subject of qualified privilege. With respect to the publication to the Lord Chancellor, the judge considered that the Lord Chancellor has no powers of disciplining or punishing a solicitor who misbehaves but the lack of any direct power to discipline or punish does not mean that the Lord Chancellor has no interest in the complaint, because solicitors are officers of the court and the Lord Chancellor is charged with responsibility to ensure that the machinery of justice runs smoothly. He is sufficiently concerned in the proper behavior of solicitors, in solicitors who as potential holders of judicial office, in the expeditious prosecution of litigation and in ensuring that litigants are honestly and conscientiously advised, to give him the necessary interest to protect the communication with qualified privilege.

[52] In the present appeals, the appellant, being the president of Chinwoo, is responsible for the proper conduct and management of the affairs of Chinwoo.

The members of Chinwoo were unhappy that Chinwoo had been deprived of 46 units which was the agreed sharing ratio of 23:77 in the project due to the free hand clause included in the additional agreement which was drawn up by the respondent's legal firm. Although the trustees of Chinwoo had agreed to the free hand clause, the respondent was a trustee of Chinwoo then.

[53] The appellant clearly has an interest to forward to the BC for its attention the complaint that he had sent to the DB. The BC has a corresponding interest or duty to receive the communication as the respondent is an advocate and solicitor. We agree with the appellant's counsel that the letter sent by the appellant to the BC is prima facie an occasion of qualified privilege.

Whether malice as contemplated in the authority of *Horrocks v Lowe* [1974] 1 All ER 662 ('Horrocks') may be inferred from the failure on the part of the defendant to take steps that he is not obliged to in law for the purpose of defeating the defence of qualified privilege (Question 4)

[54] Malice is a necessary element in an action for libel. The law prevents the inference of malice in the publication of statements which are false in fact and injurious to the character of another if such statements are fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. It affords a qualified defence depending upon the absence of actual malice (see *Toogood v Spyring* (1834) 149 ER 1044; (1834) 1 CM & R 181; [1834] EngR 363; (1834) 1 CrM & R 181).

[55] The prima facie defence of qualified privilege is not available if it is shown that a defendant has been actuated by actual or express malice or if he has used the occasion for some indirect or wrong motive. In *Royal Aquarium and Summer and Winter Garden Society, Limited v Parkinson* (1892) 1 QB 431 Lopes LJ said:

> Not only must the occasion create the privilege, but the occasion must be made use of bona fide and without malice. The defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive.

[56] In the case of *Horrocks v Lowe* [1974] 1 All ER 662; [1975] AC 135 the House of Lords held that a defendant was malicious if he 'misused' the privileged occasion by not speaking out of duty or to protect a moral interest. Lord Diplock said, amongst others, as follows:

> For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit — the existence of some public or private duty,

whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.

... So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive with which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interest.

[57] The courts below had found that the absence of mandate to lodge the complaints is per se sufficient to prove malice. For the appellant it is submitted that a lack of mandate per se does not constitute an indirect motive or the absence of honest belief as the appellant stood to gain nothing from making the complaints. The appellant had testified that he had wanted to carry out his duty as president and wanted the matter to be properly investigated by the proper authorities. The respondent had alleged that the appellant was actuated by malice and that he had an ulterior motive because he had filed six complaints over the same issue within 28 days.

[58] The minutes of the 2003 AGM and the GC meeting on 2 November 2004 show that there is sufficient mandate for the appellant to lodge the complaints. In our considered view, the appellant's mere act of filing the complaints with the various relevant authorities, without more, is insufficient to prove malice. We find that the respondent failed to prove that the appellant was actuated by malice.

CONCLUSION

[59] Pursuant to our reasons aforementioned our answers to the questions posed are as follows:

(a) questions 1 and 3 — affirmative; and

(b) questions 2 and 4 — negative.

In view of our findings above, we do not consider it necessary to answer question 5.

A **[60]** Consequently we allow all the four appeals. We set aside the decisions of the courts below. We award global costs in the sum of RM150,000 for the four appeals to the appellant. Costs is subject to the payment of allocator. The deposits paid are refunded to the appellant.

B **[61]** Pursuant to our decision, we make the following consequential orders:

(a) the first respondent is to refund the sum of RM510,301 to the appellant within 30 days with interest at 5%pa from 28 September 2012 until full payment; and

C (b) the second respondent is to refund the sum of RM56,133 to the appellant within 30 days with interest at 5%pa from 28 September 2012 until full payment.

Appeals allowed; decisions of courts below set aside.

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Reported by Ashok Kumar

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